Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

WARREN L. BROWN,

Petitioner,

vs.

ROLAND IVES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are Constitutional rights violated when allegations of child abuse and child sexual abuse made by state case workers resulted in a court order prohibiting contact between grandparent and grandchildren, and the grandparent was not allowed to participate in the proceeding wherein the order was issued or in any subsequent proceeding?

2. Does the right to seek intervention in a child protective proceeding satisfy due process requirements, where the statute under which intervention might have been allowed did not contemplate intervention for redress of the kind of injury suffered?

3. When, if ever, might the conduct of state case workers and government officials which violated Constitutional rights result in liability in a federal damages action under Title 42 U.S.C. § 1983?

4. Were details in the complaint sufficient to sustain a § 1983 suit against past and present State Commissioners of the Department of Human Services, where personnel were alleged to have violated well-established Constitutional rights and there was a statutory duty to train, monitor and supervise?

PARTIES TO THE PROCEEDING

Petitioner, Warren L. Brown, is an individual residing in Portland, Maine. He was the Plaintiff in the United States District Court for the District of Maine and was the Appellant before the United States Court of Appeals for the First Circuit.

Respondents, H. Rollin Ives, Jane Sheehan and Kevin Concannon were commissioners of the Department of Human Services during the relevant period. Kevin Concannon is currently the commissioner. Respondents were Defendants in the lower court proceedings. Respondents were Appellees before the United States Court of Appeals for the First Circuit.

Respondents Donna Niemi, Debra Schaedler, Francis Keating, Kevin Dagnese and Ellen Potter were case workers and supervisors with varying degrees of authority employed by the Department of Human services during the relevant period. Each Respondent was a Defendant in the lower court proceeding and each was an Appellee before the United States Court of Appeals for the First Circuit.

There are no other parties to this action.

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OPINIONS BELOW

On November 7, 1997, the United States Court of Appeals for the First Circuit issued its opinion, affirming the decision of the United States District Court for the District of Maine.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the First Circuit and its judgment of November 7, 1997. That judgment affirmed the lower court's grant of dismissal. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner and paternal grandparent, Warren L. Brown, was cut off from all relationship with two of his young grandchildren, Thomas and Me'chelle, by action taken in a protective proceeding initiated by the Maine Department of Human Services ("Department"). The Department sought and obtained a preliminary protection order against Warren Brown on June 10, 1993, which read,

> IT IS ORDERED, pursuant to 22 M.R.S.A. Sections 4034 and 4036 that the above-named child(ren) be given the following protections: That Mr. Warren Brown have no contact direct or indirect, with

> Thomas and Michelle . . . ; that Kathi Brown allow the Department of Human Services access to the children so that we can monitor this order.

Even though Warren Brown was the subject of the June 10 court order, he was not given notice of the hearing nor was he on the list of persons to be served with the Order. Nevertheless, Warren Brown was given a copy of the Order and affidavit upon which the Order was based, which alleged sexual and other child abuse of the children by Warren Brown. Others obtained the information that was in the Order and affidavit, and it was soon common knowledge that it was believed that Warren Brown had sexually and in other ways abused his grandchildren and that he was no longer allowed to see them.

Warren Brown attempted to attend a hearing wherein the order of June 10, 1993 was reviewed, but he was denied access to the courtroom by Department worker Donna Niemi and other Department representatives.

The June 10, 1993 Order had issued on information provided by Donna Niemi who alleged, among other things, that Warren Brown was "an untreated sex offender." Allegations that Warren Brown had sexual abused Thomas had been made in 1989 by the mother, and were supposedly substantiated to a case worker by the then 25 month-old child. The allegation of sexual abuse had been investigated in 1989 and 1990 to varying degrees and no action against Warren Brown was taken by either the police or the Department. Warren Brown had consistently denied the allegation and had maintained a steady and growing relationship with his grandchildren between 1989 and 1993, with the mother's encouragement.

Approximately one month after the June 10, 1993 Order, the mother Kathi Duncan (Brown) admitted to her own abuse

of the children, and the Department obtained a court order within the same child protective proceeding against her. Custody of the children was placed with the Department and the mother was admitted for psychiatric treatment and evaluation.

As part of the protective proceeding process and perhaps because Warren Brown was the subject of a Department child protective order, the Department arranged for Warren Brown to be professionally evaluated for his alleged abusive behavior, including for alcohol abuse. Warren Brown cooperated in the hope of regaining contact with his grandchildren and of clearing his name of the abuse allegations against him. After attending numerous appointments with various professionals, the evaluations were abruptly stopped, for reasons unknown to Warren Brown.

When the evaluations were stopped and the Department persisted in excluding Warren Brown from all contact with his grandchildren and any participation in the child protective proceeding, Warren Brown brought a motion to intervene in the child protective proceeding, pursuant to Maine Rules of Civil Procedure, Rule 24. Mr. Brown's motion was denied on grounds that the statutory structure of the child protective procedure allowed participation only by those specifically named in the statute, and grandparents were not named as potential participants. Mr. Brown began appeal of the denial of his motion, however, dismissed that appeal and brought another motion under a statute, newly enacted, which allowed grandparent intervention into child protective proceedings, but only under certain circumstances. 22 M.R.S.A. § 4005-B.

The newly enacted statute allowed intervention of a grandparent in child protective proceeding when: (1) a relationship existed between the grandparent and children; (2) the intervention was consistent with the purposes of the child

protective statutes; and (3) when such intervention was in the best interest of the children. 22 M.R.S.A. § 4005-B.

The Department, the mother and the children's guardian *ad litem* objected to Warren Brown's motion to intervene for various reasons, including the following: (1) that the allegations of abuse made against Warren Brown made it unlikely that his intervention would be consistent with the purposes of the child protective statute Title 22 M.R.S.A. § 4003 and intervention was therefore not in the best interest of the children; and (2) that Warren Brown sought intervention to "clear his name," which purpose was not consistent with the purposes of the child protective statute or in the best interest of the children. The parties submitted affidavits, stating facts which supported their respective positions on the motion to intervene.

The motion to intervene under the new statute was denied after a non-testimonial hearing. The Order issued October 19, 1994 and found that Warren Brown sought intervention to "clear his name" and that his participation as a party would not be in the best interest of the children. Later appeals of the denial through the state appellate courts were unsuccessful.

Prior to a final decision on Warren Brown's appeal to the Maine Supreme Judicial Court on the Motion to Intervene under Title 22 M.R.S.A. § 4005-B, the Department began termination proceedings against the father of the children, Jeffrey Brown. The mother had previously consented to the termination of her parental rights. Warren Brown filed a motion to stay the termination proceedings against the father until his motion to intervene was finally decided by the Maine Supreme Judicial Court. The Maine Supreme Judicial Court declined to stay the termination proceedings pending final decision by them on Warren Brown's appeal of the motion to intervene.

Warren Brown then brought the instant action in the United States District Court for the District of Maine. He alleged violation of rights secured under the United States Constitution, including denial of due process, damage to reputation and change in legal status without opportunity to be heard, and denial of rights to familial relations. With his complaint, Mr. Brown filed a motion for a temporary restraining order (TRO), asking the District Court to enjoin the state court termination proceedings against the father until decision on the final appeal of his motion to intervene in the child protective proceeding was decided by the Maine Supreme Judicial Court. The District Court denied the motion for TRO, declining to enjoin the state court termination proceedings.

The termination proceedings in state court resulted in the termination of the father's parental rights and the father did not appeal. The Maine Supreme Judicial Court then affirmed, by Memorandum of Decision, the Superior Court decision which had denied Warren Brown's motion to intervene in the child protective proceeding. Warren Brown was at that point without any state forum for addressing the wrongs done to him by the Department.

Warren Brown in [illegible]ed to pursue his complaint in the United States District Court. The attorney for defendants in the action brought a motion to dismiss Warren Brown's case based on mootness, insufficiency of the pleading, and immunity. The District Court granted the motion, dismissing all the various claims for reasons of mootness, sufficiency of the pleading and immunity by order dated in July 2, 1996.

Warren Brown appealed the decision of the United States District Court to the First Circuit Court of Appeals, which upheld the decision of the District Court. Warren Brown now brings this appeal of the First Circuit decision.

Warren Brown has not seen his grandchildren since the issuance of the court order on June 10, 1993. He has been denied all opportunity to factually contest the allegations against him which resulted in the order denying him any relationship at all with his grandchildren. The whereabouts of the grandchildren are unknown to Mr. Brown and, without the cooperation of the Department, he has no hope of ever reuniting with his grandchildren again, at least until they are of the age of majority.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CONSTITUTIONAL RIGHTS ARE VIOLATED WHEN ALLEGATIONS OF CHILD ABUSE AND CHILD SEXUAL ABUSE MADE BY STATE CASE WORKERS RESULT IN A COURT ORDER PROHIBITING CONTACT BETWEEN A GRANDPARENT AND HIS GRANDCHILDREN, AND THE GRANDPARENT WAS NOT ALLOWED TO PARTICIPATE IN THE PROCEEDING WHEREIN THE ORDER WAS ISSUED OR IN ANY SUBSEQUENT PROCEEDING.

A. Warren Brown's legal status was changed as a result of the June 10, 1993 Order against him, giving rise to a reputational injury worthy of due process protections.

Under the circumstances in this case, Constitutionally protectible interests entitling Warren Brown to due process under the Fourteenth Amendment arose under the tests articulated in *Paul v. Davis*, 424 U.S. 793, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).

In *Constantineau*, the Court held that notice and opportunity to be heard are essential where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him. *Constantineau*, at 437. The Court in *Paul v. Davis*, refined the holding in *Constantineau*, ruling that the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment arise only when the reputational injury to plaintiff includes an alteration of legal status, because of what the government is doing. *Paul*, at 708,709. The holding in *Paul* was construed as consonant with the holding in *Constantineau* because the plaintiff's legal status in *Constantineau* was altered when he was barred from purchasing liquor as a result of the government's "posting" of his name. *Id.*

Petitioner Warren Brown has alleged that he was defamed by the Department when the affidavit by social worker Donna Niemi and the Order against him were published to those other than the parties to the child protective proceeding. The First Circuit did not find that Warren Brown was not defamed by the potential publishing. The First Circuit found, however, that the court Order did not change Warren Brown's legal status: that he remained a grandparent with whatever rights a grandparent might have under Maine law.

The First Circuit erred in finding that the legal status of Warren Brown was not altered because of the what the state was doing to him. In fact, the state sought and obtained a court order against him, disallowing him from contact with his grandchildren — and actively worked to foreclose to him all avenue for review of that determination. The governmental action taken against him deprived him of a right previously held — the right to see and be seen by his grandchildren, the right to send letters or presents to them, or the right to talk to them by telephone. Other grandparents have such rights, albeit

with a parent's permission. Warren Brown was denied these rights, and no parent could issue such permission in the face of the court order obtained by the state.

Warren Brown's legal status was changed by the actions of the state and he is entitled to redress for the reputational injury under the procedural due process guarantees of the Fourteenth Amendment.

B. Allegations of child abuse and child sexual abuse against a family member invade an area of privacy which triggers the due process guarantees of the Fourteenth Amendment, even in the absence of a change in legal status.

The First Circuit erred in failing to recognize that the injury to Warren Brown occurred in the area of a constitutionally protected "zone of privacy," entitling him to procedural due process even without an attendant alteration of his legal status. *Paul*, at 712, 713; *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987); *Bohn v. County of Dakota*, 772 F.2d 1433, 1436, n.4 (8th Cir 1985), *cert. denied*, 475 U.S. 1074, 106, 106 S. Ct. 1192, 89 L. Ed. 2d 307 (1986).

In *Paul*, the Court recognized that an injury in the arena of the "right of privacy" gave rise to Constitutional protections beyond the protections afforded to persons subject to arrest. *Paul* at 713. Activities within the "zones of privacy" included matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* Warren Brown has made a claim which falls within the well-known arena of the right of privacy — family relationships, and his claim is protected by Constitutional guarantees.

In *Bohn v. County of Dakota*, the Eighth Circuit applied the law in *Constantineau* to a case involving allegations of child

abuse, stating that such allegations do more than simply affect reputation: they drive a wedge into families and threaten their very foundation; they create a stigma, erode family solidarity internally and impair the family's ability to function in the community. *Bohn* at 1436, n.4. The *Bohn* court found that where such allegations are made in the context of a child protective proceeding, due process protections must be afforded to the accused, under the law of *Constantineau*.

The First Circuit in *Borucki v. Ryan* declined to recognize the right of privacy in the area of psychiatric care as clearly established, but contrasted psychiatric care to the clearly established right of privacy in the areas of marriage, procreation, contraception, family relationships, and child rearing and education. *Borucki* at 845.

In a Fourth Circuit case, allegations of child abuse against a parent would not sustain a federal damages action under section 1983, where the parents subsequently participated in proceedings which cleared them of the charge but the record of the charge remained on a computer reporting system. *Hodge v. Jones*, 31 F.3d 147, 164 n.8 (4th Cir. 1994).

The Court should grant certiorari to clarify when allegations of child abuse and child sexual abuse will give rise to procedural due process protections. In our case, where Warren Brown was accused of sexual abuse and child abuse and ordered away from his grandchildren, as it turned out for life, the due process guarantees of the Fourteenth Amendment should apply.

Petitioner's Constitutional rights were violated by the actions of the state, and the motion to dismiss should have been denied.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE IF THE RIGHT TO SEEK INTERVENTION IN A CHILD PROTECTIVE PROCEEDING SATISFIES DUE PROCESS REQUIREMENTS, WHERE THE STATUTE UNDER WHICH INTERVENTION MIGHT HAVE BEEN ALLOWED DID NOT CONTEMPLATE INTERVENTION FOR REDRESS OF THE KIND OF INJURY SUFFERED.

While the United States Supreme Court has not decided the issue of what exact rights a grandparent may be afforded under the Constitution, it is clear that the biological link in connection with familial relationship will be entitled to some form of protection. *See, e.g., Lipscomb by and Through DeFehr v. Simmons*, 962 F.2d 1374, 1378 (9th Cir. 1992) citing *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977). (There is substantial authority for the proposition that Due Process places a limit on the state's ability to interfere with certain extant relationships among family members.)

In this case, Petitioner's request for due process protection under the United States Constitution came only after the state obtained an order to sever his relationship with his grandchildren without affording him any opportunity to be heard on the facts. Only two cases found by Petitioner are close to the facts of this case.

A case in the Seventh Circuit involved a grandfather, whose rights to see a grandchild were cut off when an order of probation for the mother resulted in no contact by the grandfather. *Drollinger v. Milligan*, 552 F.2d 1220, 1226, 1227 (7th Cir. 1977). In *Drollinger*, the court held that due process

required the state to provide a hearing in which those family members whose privacy interests were impaired would have the opportunity to respond to the state's reasons for limiting their civil rights to care for other family members. The Seventh Circuit has declined to extend the holding in *Drollinger* to afford constitutional protection to grandparents in other settings. *Compare*, *Drollinger v. Milligan with Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982), *cert denied*, 459 U.S. 1069 (1982).

A state court case in California illumined the importance of a hearing where child abuse allegations are made, even though the allegations were not against a biological parent. *In re Kiesha E.*, 859 P.2d 1290 (Cal. 1993). In *In re Kiesha*, where a non-biological "defacto" parent was charged with child abuse and sought to intervene in the child protective proceeding, it was proper to require a hearing to determine the merits of the child abuse charge prior to ruling on the motion to intervene.

No cases have found that grandparents have no protectible Constitutional rights, even when the specific right claimed by an extended relative as Constitutional in nature may be questioned or denied. The trend of case law in the country is to find that there is no general obligation for the state to facilitate or fund the exercise of Constitutional rights of grandparents. *Lipscomb by and Through DeFehr*, 962 F.2d at 1378. Cases where such obligation has been denied involved grandparents claiming rights to visitation, adoption and the right to be funded by a foster care program. *Id. See also Mullins v. State of Oregon*, 57 F.3d 789 (9th Cir. 1995); *Reed v. Glover*, 889 S.W. 2d 729 (Ark. 1994); *In re Adoption of Taylor*, 678 S.W. 2d 69 (Tenn. Ct. App. 1984).

Warren Brown was not, however, asking the state to facilitate his Constitutional rights. Warren Brown was asking for a hearing after the state had denied him his rights.

Both the District Court and the First Circuit found that Warren Brown's right to *seek* intervention was sufficient due process related to the rights abridged. Neither court found that what happened to Warren Brown gave rise to a substantive due process claim.

The courts erred in finding that Warren Brown's ability to seek intervention satisfied his due process rights in this context. The statute under which Warren Brown sought intervention did not provide him with the necessary safeguards or opportunity for due process in this context. *See Wisconsin v. Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971) (There is no requirement to proceed through the state court appeals system, where the statute to be applied clearly provides no safeguard or opportunity for due process.)

The intervention statute available to Warren Brown, Title 22 M.R.S.A. § 4005-B, was designed to facilitate the child protective placement procedure, and was unconcerned with any injury done to him. The state District Court decision which was upheld on appeal through the Maine Supreme Judicial Court found that Warren Brown sought intervention to "vindicate his name" and that this did not advance any recognized purpose under 22 M.R.S.A. § 4003. No state statute allowed Warren Brown adequate due process protections for his circumstances, and he should not be penalized for attempting to obtain an interpretation of a new state law in his favor.

The First Circuit recognized a due process claim "lurking in this case . . . of a somewhat different character," but erroneously placed the responsibility for vindicating that claim upon courts, which are immune from any liability. The courts merely applied the existing law to the positions which the Department took with regard to Warren Brown. The Department — starting with the commissioners and flowing down to the case

workers — must stand responsible for its actions, which reflected its policies and procedures. Those actions, policies and procedures were alleged to included at least the following: barring Warren Brown from the court room where the hearing was conducted on the order specifically against Warren Brown; leaking court documents which identified Warren Brown as an untreated sex offender and child abuser to the community, which leak was a crime under Maine statutes, Title 22 M.R.S.A. § 4008(4); excluding Warren Brown from any investigation regarding the charges made against him, while continually denying him all rights to see his grandchildren, even after the expiration of the June 10 order; persistently objecting to Warren Brown's participation in any court proceeding which might vindicate him from what the state had done to him. The Department should be and must be held accountable for its concerted actions, which actions directly denied to Warren Brown rights secured to all citizens by the United States Constitution.

Warren Brown had a well-known and recognized position in his family related to the well-being and care of his grandchildren. Without warning or opportunity to be heard, this relationship was obliterated by the state, and he was labelled an untreated sex offender and child abuser. The impact this had on Warren Brown and his family should not be underestimated. Along with a permanent loss of his grandchildren, Warren Brown suffered shame and humiliation in his community and complete loss of status in his family, with no opportunity for rehabilitation. The process to which Warren Brown was due was a *meaningful* opportunity to be heard — not merely the *right* to seek a meaningful opportunity to be heard.

Certiorari should be granted to review what degree of due process should be afforded where the state strips a person of familial relationships and his reputation with no opportunity to be heard.

III.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHEN, IF EVER, CONDUCT OF STATE WORKERS AND GOVERNMENT OFFICIALS WHICH VIOLATED CONSTITUTIONAL RIGHTS MIGHT RESULT IN LIABILITY IN A FEDERAL DAMAGES ACTION UNDER TITLE 42 U.S.C. § 1983.

The First Circuit concluded that the social worker responsible for the initial affidavit and court proceeding, Donna Niemi, was protected by qualified immunity. The court concluded that because Niemi was protected, others who were less directly involved were also protected by qualified immunity. It was error for the court to conclude that Niemi and all others alleged to be involved were so protected.

No case has been found by Petitioner where a federal court has held case workers or others involved in child protective proceedings liable in a federal damages action under Section 1983. For various reasons, courts have balanced the interest of the state in protecting children against the conduct of defendants and have concluded uniformly that under varying circumstances, the doctrine of qualified immunity applied. *See, e.g., Foy v. Holston*, 93 F.3d 1528, 1537 (11th Cir. 1996). (State officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of "clearly established law" and are therefore immune from liability under § 1983.); *Hodge v. Jones*, 31 F.3d 157, 167 (4th Cir. 1994). ("To expect Defendants (child protective workers) to resolve what reasonable jurists have long debated — namely the precise strictures of the penumbral right of familial privacy, cast in the sweeping language of the Supreme Court cases . . . is to impose burdens and expectations well beyond their reasonable capacities."); *Frazier v. Bailey*, 957 F.2d 920, 931

(1st Cir. 1992). (A § 1983 suit will seldom if ever apply against state workers in the child protective process because it is difficult, if not impossible, for officials to know when they have violated "clearly established" law.); *Ellis v. Hamilton*, 669 F.2d 510, 516 (7th Cir. 1982), *cert. denied,* 459 U.S. 1069 (1982). (Federal courts are not the right tribunals for family-related matters, where federal district judges are inexperienced in family law matters and damages are rarely an adequate remedy.)

Warren Brown does not seek liability on the part of the Department because the Department sought and obtained an order against him or because he might have been investigated for child abuse. *See, e.g. Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993). (Where a grandparent fully participated in the child abuse investigation and court proceedings, there was no violation of any Constitutional right.) Rather, Warren Brown seeks liability based on actions which Department personnel took without investigation and without opportunity for him to be heard. These circumstances do not compare with the many cases wherein liability is sought to be imposed after an investigation and court proceeding. *Id.*

The rights claimed by Warren Brown were well-recognized and established rights. *See Borucki v. Ryan*, 827 F.2d 836, 845 (1st Cir. 1987). (The rights of privacy in the area of marriage, procreation, contraception, family relationships, and child rearing and education are clearly established, but the right of privacy in the area of psychiatric care was not). *See also McMillan v. Johnson*, 88 F.3d 1554, 1565 (11th Cir. 1996). (Government officials were not entitled to qualified immunity simply because there was no factually similar case, where their actions violated clearly established rights.)

The Department's actions in beginning a comprehensive

evaluation of Warren Brown show conclusively that the Department knew Warren Brown's rights had been invaded by their actions.

The social workers and department officials are not entitled to qualified immunity, and the motion to dismiss should have been denied.

IV.

CERTIORARI SHOULD BE GRANTED TO DETERMINE IF DETAILS IN THE COMPLAINT WERE SUFFICIENT TO SUSTAIN A § 1983 SUIT AGAINST PAST AND PRESENT STATE COMMISSIONERS OF THE DEPARTMENT OF HUMAN SERVICES, WHERE STATE CASE WORKERS VIOLATED WELL-ESTABLISHED CONSTITUTIONAL RIGHTS AND COMMISSIONERS HAD A STATUTORY DUTY TO TRAIN, MONITOR AND SUPERVISE.

The District Court dismissed from the suit various named past and present commissioners of the Department in the suit, for reasons related to insufficiency of the pleading and lack of liability in a § 1983 suit based on the theory of respondeat superior. The First Circuit ruled that because Donna Niemi was immune from suit, so were lesser involved named defendants. It was error to dismiss the suit as to the named past and present commissioners.

Petitioner's complaint alleged that the three commissioners named were responsible for the control and supervision of the personnel and activities of the Department during the relevant time. In fact, this allegation is not mere generalization or boiler plate, but is based on a statutory requirement that the Department train, assess, investigate and evaluate the workers charged with

carrying out child protective activities. 22 M.R.S.A. § 3911.

Petitioner's complaint alleged that the current commissioner, Kevin Concannon, endorsed the practices of the social workers which resulted in violation of Warren Brown's rights. Petitioner alleged that the current commissioner failed to supervise, train and control the activities of the social workers.

The factual allegations of the complaint encompass the terms of the various commissioners named. H. Rollin Ives was commissioner when the allegation of child sexual abuse against Warren Brown was first made in 1989. This allegation was either insufficiently investigated or irresponsibly handled, because the allegation was not purged as unsubstantiated, yet Warren Brown continued to have contact with the alleged victim of the abuse. In June, 1993, the Department was able to revived this stale allegation. Commissioner Ives is responsible for the degree of care and skill of the Department case workers who investigated that allegation.

Jane Sheehan was commissioner when the court order of June 10, 1993 issued, and remained commissioner until February 22, 1995. Commissioner Sheehan had responsibility for the conduct of her case workers, and the allegations related to her duty of control and supervision are enough, in conjunction with other facts plead, to maintain her as a defendant.

The allegations against the commissioners together with the allegations about Department personnel are sufficient, in conjunction with the state statute affirmatively requiring these activities, to survive a motion to dismiss for insufficiency of the pleading.

Petitioner's complaint against the commissioners should

not have been dismissed if, from the facts alleged, it appeared the complaint could be cured with leave to amend. *Ballou v. General Electric Company*, 393 F.2d 398, 399-400 (1968) citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Any gaps in the complaint related to drawing parallels between events and specific commissioners should be overlooked or Petitioner should have been allowed to cure. The District Court erred in dismissing the complaint as to the commissioners.

CONCLUSION

Federal damages actions must be available for adjusting disputes with the authorities in the family law context, contrary to the opinion of the First Circuit. The vague standards, wrenching situations and clumsy legal tools recited by the First Circuit are insufficient reasons why § 1983 claims involving family law matters should not be brought. So long as family matters are relegated to our court system for resolutions, courts must work to clarify standards, sort out the wrenching situations and refine the clumsy legal tools.

It is critical that this court, the highest court in the land, not turn its back on this important area. Otherwise, our nation's less fortunate who are often participants in child protective proceedings, are left to the mercy of poorly trained, perhaps well-meaning case workers and complacent state courts.

Petitioner submits that this Honorable Court should decide when, if ever, an individual may look to federal courts for relief, and requests a grant of the Writ of Certiorari in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 7, 1997

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1954

WARREN L. BROWN,

Plaintiff, Appellant,

v.

ROLAND IVES, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, *U.S. District Judge*]

Before

Boudin, *Circuit Judge*,

Gibson,* *Senior Circuit Judge*,

and Pollak,** *Senior District Judge*.

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* Hon. John R. Gibson, of the Eighth Circuit, sitting by designation.

** Of the Eastern District of Pennsylvania, sitting by designation.

Appendix A

Paula House McFaul with whom *John J. Eisenhart* and *McFaul Eisenhart* were on brief for appellant.

James D. Williams, III, Assistant Attorney General, with whom *Andrew Ketterer*, Attorney General, and *Peter J. Brann*, Assistant Attorney General, were on brief for appellees.

November 7, 1997

BOUDIN, *Circuit Judge*. Warren Brown appeals from the dismissal of his civil rights claims for damages under 42 U.S.C. § 1983. The claims trace back to an affidavit, filed by a caseworker in connection with a child protection proceeding, that labeled Brown an "untreated sex offender." As usual, where a motion to dismiss has been granted, we assume the truth of the allegations in the complaint and construe it in the light most favorable to the opponent of the motion, here Warren Brown. *See Harper v. Cserr*, 544 F.2d 1121, 1122 (1st Cir. 1976).

Warren Brown is the paternal grandfather of two minor children, Thomas and Me'chelle Brown, born in 1986 and 1988, respectively. From 1989 to 1993, Brown often looked after the children, sometimes overnight, at the request of the children's mother, Kathi Duncan. In November 1989, Thomas Brown allegedly told his mother that Warren Brown had sexually abused him.

Kathi Duncan reported the charge to the Maine Department of Human Services ("the Department"). Apparently the Department investigated the charge, but no official action was taken, and Warren Brown continued to baby-sit for the children regularly at Kathi Duncan's request. But in May 1993, Duncan reported to the Department that Warren Brown had endangered Me'chelle Brown, through faulty supervision, allegedly because he was drunk. A Department caseworker, Donna Niemi, later

interviewed Thomas Brown who referred again to the alleged 1989 sexual abuse.

At a hearing on June 10, 1993, in the state court, Duncan consented to a child protection order requiring her to keep the children away from Warren Brown and granting the Department access to the children. *See* 22 M.R.S.A. §§ 4031, 4036. In support of the order Niemi filed an affidavit, in which she described Warren Brown's alleged negligent supervision of Me'chelle Brown. Niemi's affidavit also described briefly Thomas Brown's November 1989 allegation of sexual abuse and said that the child had confirmed to Niemi that the incident had occurred. The affidavit described Warren Brown as "an untreated sex offender."

Niemi, and perhaps other Department officials, then arranged for Warren Brown to be professionally evaluated for his alleged behavior and also for alcohol abuse. Warren Brown cooperated in the hope of regaining contact with his grandchildren. Thereafter, according to Warren Brown, he was told by Department officials that he had missed appointments and no further treatment or evaluation would be offered. Warren Brown claims that he did not miss any appointments.

In July 1993, the Department obtained a court order under the same child protection provisions granting it temporary custody of the children based on charges that Kathi Duncan had abused them. The Department then sought full custody of the children. Warren Brown sought to intervene, was rejected and then renewed his motion, invoking a new state statute that allowed judges to grant grandparents intervener status in child protection proceedings where this would serve the interests of the child and the purposes of the statute. 22 M.R.S.A. § 4005-B.

The renewed motion was denied after a hearing, and a later appeal by Brown through the state appellate courts was fruitless.

In February 1995, the state court granted full custody of the children to the Department, with visitation rights for the parents. The order provided that family reunification efforts would continue. But in October 1995, Kathi Duncan consented to an order terminating her parental rights under a separate subchapter of the Maine statute, and in January 1996, the state court terminated the parental rights of the child's father — Warren Brown's son — who did not appeal. *See* 22 M.R.S.A. §§ 4050-4058.

In the meantime, in November 1995, Warren Brown brought the present section 1983 action in the federal district court in Maine. The now pertinent portion of Brown's complaint charged that Niemi, and several other Department employees connected to the case, had violated Warren Brown's due process rights under the 14th Amendment by libeling him in the Niemi affidavit, interfering with his access to the child protection proceedings, and ultimately depriving him of contact with his grandchildren. Brown sought damages of $1.2 million and asked the court to enjoin the proceedings to terminate his son's parental rights.

In July 1996, the district court granted the defendants' motion to dismiss. On the claim for injunctive relief, the district court held that the state proceedings sought to be enjoined had concluded and that the request for relief was now moot. The court also eliminated certain of the defendants-primarily higher — level officials — on the ground that no sufficient connection between them and the events in dispute was adequately alleged.

Appendix A

As for the claims against Niemi and other Departmental employees associated with the case, the dismissals were based on qualified immunity. The district court held that neither the reputational nor associational rights asserted by Warren Brown were "clearly established" to the extent needed to overcome qualified immunity, and the court also held that there was no clearly established law to show that the Department's actions violated his substantive due process rights under a "shock the conscience" test.

Brown now appeals from the dismissal of his damage claims. Our review is plenary. *Providence School Department v. Ana C.*, 108 F.3d 1, 2 (1st Cir. 1997). Because we find that Niemi was herself protected by qualified immunity, there is no reason to discuss those who were less directly involved.

1. "[G]overnment officials performing discretionary functions, generally are shielded [by qualified immunity] from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The test is objective; claims of malice do not overcome qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Nor is it enough that the right claimed to have been violated has been recognized at an abstract level: existing case law has to give the official reason to know that the specific conduct was prohibited. *See id.* at 640.

A thumbnail version of Brown's constitutional claim is as follows. Niemi's charge that Warren Brown was an untreated sex offender was made without a thorough investigation; it foreseeably frustrated Warren Brown's efforts to maintain

contact with his grandchildren; and because the charge somehow became public it injured Warren Brown's public reputation. Thus, Brown says, Niemi's actions violated his due process rights of family integrity and freedom from governmental falsehood, and her conduct as a whole "shocks the conscience" under *Rochin v. California*, 342 U.S. 165, 172 (1952).[1]

Starting with family integrity, a few cases suggest that grandparents may, in some circumstances, have some constitutionally protected rights in relation to their association with their grandchildren. We spoke of this possibility in *Watterson v. Page*, 987 F.2d 1, 8 n.6 (1st Cir. 1993), limiting our remarks to grandparents who were residing with the grandchildren. *See also Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Protection of nonresident grandparents — like Warren Brown — has an even slimmer pedigree in the case law. *Compare Drollinger v. Milligan*, 552 F.2d 1220, 1227 n.6 (7th Cir. 1977), *with Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir.), *cert. denied*, 459 U.S. 1069 (1982).

Similarly, in one case the Supreme Court recognized a protected due process right against a false government designation made with no opportunity for challenge. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). But in *Paul v. Davis*, 424 U.S. 693, 711-12 (1976), the Supreme Court ruled that the designation itself had to change the victim's legal status and that mere damage to reputational interests did not

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1. The complaint also alleged in general terms that Niemi or others barred Warren Brown from the courtroom; but custody proceedings are often closed to the public, and Warren Brown was in fact able to file and pursue his motion to intervene, albeit without success.

rise to a constitutional violation. *See also Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991). Here Warren Brown's legal status was not changed by Niemi's charge: he remained a grandparent entitled to whatever rights a grandparent might have under Maine law.

But even if Warren Brown had constitutionally protected interests in visitation with non-resident grandchildren or against reputational harm, he has no precedent to show that the circumstances of his case come even close to a due process violation. The state has a very strong interest, repeatedly recognized, in the protection of children from abuse, whether by their parents or anyone else. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 640 (1968). A special responsibility rests on agencies like the Department, and on caseworkers like Niemi, to investigate colorable charges that come to their attention and institute appropriate proceedings where warranted. Often, the only witness, other than the charged offender, is the child itself.

Here, Thomas Brown had apparently twice repeated the charge that his grandfather had engaged in abusive sexual conduct; Warren Brown does not dispute that the charge was made by his grandson. The child's mother also reported that, due to drunkenness, Warren Brown had endangered Me'chelle. Because the children's mother had continued to entrust the children to Warren Brown, Niemi could certainly have thought that an initial protection order was important and ought to be sought immediately.

Niemi herself had no authority to bar Warren Brown from contact with his grandchildren while they were still in their mother's care. Niemi's remedy was to begin a court proceeding and to tell the court what she had learned. Then it became the

court's responsibility to decide what to do next. Of course, Niemi might first have conducted a further investigation into the alleged sexual abuse claim, now several years in the past, but the precedents impose no such constitutional obligation. On the contrary, agencies like the Department have wide latitude to pursue investigations, and begin proceedings based on colorable charges of child abuse. *See Frazier v. Bailey*, 957 F.2d 920, 931 n.12 (1st Cir. 1992).

For the same reasons, there is no prospect that Niemi's conduct can be described as so outrageous as to constitute a due process violation under *Rochin*'s "shock the conscience" test. That standard does have vitality in this circuit, but it is confined to situations of brutal or otherwise outrageous behavior. *See Sousa v. Pina*, 53 F.3d 423, 424-27 (1st Cir. 1995). In the present case, a caseworker's accusation incident to a judicial proceeding — possibly mistaken but made with colorable basis — is not even wrongful conduct, let alone outrageously so.

2. There is lurking in this case a due process claim of a somewhat different character. What is mainly troubling here is not the caseworkers charge or the supposed lack of adequate prior investigation, but something quite different: it is Warren Brown's apparent inability thus far to contest in court the allegations that (quite apart from any damage to his public reputation) may effectively have led to judicial relief that cut him off from contact with his grandchildren.

This outcome cannot be attributed to Niemi or any other of the named Departmental defendants. They were entitled to begin the proceedings, and they did not issue the orders that denied Warren Brown's intervention requests or limited his access

to his grandchildren. Rather, the outcome raises questions about the procedural fairness of judicial actions denying intervention and — to the extent that they did so — cutting off Warren Brown's access to his grandchildren.

Maine's judges are absolutely immune from damage claims based on their judicial decisions. *See Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). Nor can we review decisions of the Maine courts even for constitutional error; only the Supreme Court can do that. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). This leaves open the possibility of injunctive relief against ongoing state proceedings, although it too might face obstacles short of the merits. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (abstention doctrine).

Warren Brown did seek such an injunction in the district court but has not appealed that court's dismissal of the claim as moot. And the merits are far from clear: the state obviously has an interest in the conduct of child protection proceedings and in narrowing the issues to the welfare of the children and the interests of those most immediately concerned with their welfare, usually the parents. The Maine statute has struck a compromise, permitting the grandfather to seek intervention but only with the courts permission based on the best interests of the child.

The possibility remains of unfair application of the statute in an individual case, but whether an individual error would give rise to a federal remedy is another matter. So long as state law provides an avenue of relief — here, an appeal to higher courts — even a deprivation of protected rights does not automatically give rise to a due process claim. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981). But this subject is fraught with difficulty and we do not pursue it here.

Appendix A

As it happens, state law may still offer Warren Brown some opportunity for relief if the grandchildren are in foster care or are otherwise not yet placed for adoption. The initial protection order did effectively bar him from contact; but it was only an interim order, entered with the consent of the children's mother who during her custody of the children could herself have restricted Warren Brown's contact. Subsequent orders transferred custody to the Department and then terminated, successively, the parental rights of the children's mother and father, but none of those orders was directed at Warren Brown.

The state's counsel told us at oral argument that there is no currently effective order barring contact between Warren Brown and his grandchildren, and we can find no trace of such an order in the record. So long as the children have not been placed for adoption or formally adopted, it is at least possible under Maine law that Warren Brown could still apply for standing and intervener status in the protection proceeding that transferred custody of his grandchildren to the Department. 22 M.R.S.A. § 4005-B(2). If it were granted, he could also "request the court to grant the grandparent reasonable rights of visitation or access." 22 M.R.S.A. § 4005-B(6).[2]

Family issues, including abuse and custody, are among the most difficult for the law to resolve. Standards tend to be vague, situations may be wrenching, and the legal tools at hand are often clumsy. But, especially in the family-law realm, federal damage actions under section 1983 have usually proved to be

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2. Under Maine law, adoption (or in some cases placement for adoption) does cut off such statutory grandparent rights but does not prohibit prospective or actual adoptive parents from permitting contact between a child and grandparent. 22 M.R.S.A. § 4005-B(6).

an ineffective means of adjusting disputes with the authorities. *See generally Ellis v. Hamilton*, 669 F.2d at 515-16. There may be exceptions, but this case is not among them.

Affirmed.

APPENDIX B — ORDER ON DEFENDANTS' MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED JULY 3, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 95-353-P-H

WARREN L. BROWN,

PLAINTIFF

v.

H. ROLLIN IVES, ET AL.,

DEFENDANTS

ORDER ON DEFENDANTS' MOTION TO DISMISS

This is a federal civil rights lawsuit brought by a grandfather against state officials. He seeks injunctive relief and damages as a result of allegations that he sexually abused one of his grandchildren. He attempted, unsuccessfully, to intervene in state court proceedings where the state officials successfully terminated the parental rights (his son being the father). He now seeks damages and injunctive relief against a variety of social workers and officials within the Maine Department of Human Services ("DHS"). I **GRANT** the defendants' motion to dismiss.

The claims for declaratory and injunctive relief are now **MOOT**. The plaintiff's concern was exclusion from child

protective proceedings, or proceedings where his reputation or conduct might be in dispute. There is no suggestion that anyone in DHS contemplates bringing any fiercer such proceedings. *See Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 1664-65, 75 L. Ed. 2d 675, 683-84 (1983). There simply is no ongoing case or controversy concerning future actions by DHS personnel with respect to this plaintiff. *See American Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992).

What remains is the grandfather's claim for damages. He asserts that the defendants violated his clearly established constitutional rights with respect to (a) his reputation, (b) his right to associate with his grandchildren and (c) his substantive due process rights against state conduct that shocks the conscience.

1. The action for damages against the defendants in their official capacities is **DISMISSED**. State officers acting in their official capacities are not subject to suit for damages under 42 U.S.C. § 1983. *Will v. Michigan Dept of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989); *accord Hafer v. Melo*, 502 U.S. 21, 26, 112 S. Ct. 358, 362, 116 L. Ed. 2d 301, 310 (1991).

2. The defendant H. Rollin Ives is **DISMISSED**. Ives left office well before any of the events at issue.

3. The defendant Jane Sheehan is **DISMISSED** because there are no factual allegations against her in the Complaint.

4. The defendant Kevin Concannon is **DISMISSED**. He did not take office until February 22, 1995, well after the initiating events of this lawsuit. Concannon was Commissioner

by the time the state court proceedings began, but the only specific allegation against him is that he is "responsible for the control and supervision of the personnel and activities of DHS." Verified Compl. ¶ 3. There is no *respondeat superior* liability under section 1983. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611, 638 (1978). The plaintiff also alleges generally that all defendants "breached their duty with regard to the supervision of the conduct of DHS personnel in that supervisors failed to train, supervise and/or control the actions of their subordinates and are therefore liable." Verified Compl. ¶ 39. These general and conclusory allegations against the defendant Concannon, who was in office only during the court proceedings, are insufficient to withstand a motion to dismiss.

5. The remaining defendants are entitled to qualified immunity from liability for damages. To recover damages under 42 U.S.C. § 1983, the plaintiff must show that the defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). Not only must the right have been clearly established, but its contours must have been sufficiently clear that a reasonable official would understand that what he or she was doing violated that right. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987). As I said earlier, the plaintiff has asserted three constitutional rights here: (a) his reputation, (b) his right to associate with his grandchildren and (c) his substantive due process rights against state conduct that shocks the conscience.

Appendix B

REPUTATION

The plaintiff may be able to escape the precedent of *Paul v. Davis,* 424 U.S. 693, 712, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405, 420 (1976), holding that there is no constitutional right in reputation alone, on the basis that the action of the DHS representatives also changed his status and therefore is closer to the action in *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515, 519 (1971). Any constitutional right he may have, however, certainly is not clearly established, for it requires at a minimum the balancing of his interest in his reputation against the state interest in protecting an at-risk child from potential abuse. As the First Circuit Court of Appeals has stated, a right "can rarely be considered 'clearly established' " if balancing is required unless there is a "closely corresponding factual and legal precedent." *Frazier v. Bailey,* 957 F.2d 920, 931 (1st Cir. 1992), quoting *Myers v. Morris,* 810 F.2d 1437, 1462 (8th Cir.), *cert. denied,* 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987).

ASSOCIATION WITH GRANDCHILDREN

The plaintiff argues that he has a right to association with his grandchildren. That right also is not "clearly established." The First Circuit Court of Appeals has recognized that the liberty interest in "family integrity" (which includes associational rights) is far from "absolute or unqualified." *Watterson v. Page,* 987 F.2d 1, 8 (1st Cir. 1993), citing *Frazier,* 957 F.2d at 929-30. The Court of Appeals noted that, "[t]he right to family integrity clearly does not include a constitutional right to be free from child abuse investigations," 987 F.2d at 8, and indicated that the "scope and level of constitutional protection" for grandparents' rights of this sort "probably differs from that for parents' interests. . . ." *Id.* at n.6.

Appendix B

SHOCK THE CONSCIENCE

The plaintiff argues that the DHS actions "shock the conscience," and therefore violated his substantive due process right. The plaintiff has pointed to no precedent, however, to suggest that a DHS representative should reasonably have believed that what took place here invaded his clearly established constitutional right on this basis. Instead, there were existing state procedures for the grandfather to assert his rights in the child protection proceedings where he had the opportunity to show his "existing relationship" with the children and to demonstrate that his status as such "would be in the best interest of the child." 22 M.R.S.A. § 4005-B(3). He cannot show a "clearly established" constitutional right that would escape the qualified immunity defense.

Accordingly, all the remaining defendants are entitled to qualified immunity from damages. The defendants' motion to dismiss is therefore **GRANTED** in its entirety.

SO ORDERED.

DATED THIS 2d DAY OF JULY, 1996.

s/ D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGEMENT OF THE MAINE SUPREME JUDICIAL COURT DECIDED ON MAY 17, 1996

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 7668
Law Docket No. CUM-95-456

In re THOMAS B. *et al.*

Submitted on Briefs March 15, 1996

Decided May 17, 1996

Before WATHEN, C.J., and GLASSMAN, CLIFFORD, RUDMAN, and LIPEZ, JJ.

MEMORANDUM OF DECISION

Warren L. Brown appeals from the judgment entered in the Superior Court (Cumberland County, *Bradford, J.*) affirming the denial by the District Court (Portland, *Goranites, J.*) of Brown's second motion to intervene in child protective proceedings concerning his grandchildren, Thomas and Me'chelle. Contrary to Brown's contention, the court did not abuse its discretion in its denial of Brown's motion to intervene. *Doe v. Roe*, 495 A.2d 1235, 1237-38 (Me. 1985).

The entry is:

Judgment affirmed.

Appendix C

All concurring.

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APPENDIX D — DECISION AND ORDER OF THE SUPERIOR COURT, STATE OF MAINE DATED JUNE 28, 1995

SUPERIOR COURT, STATE OF MAINE,
CUMBERLAND, ss.

Civil Action
Docket No.CV-94-1158

MAINE DEPARTMENT OF HUMAN SERVICES

IN RE: THOMAS BROWN
ME'CHELLE BROWN

DECISION AND ORDER

This is an appeal by the paternal grandfather of Thomas and Me'chelle Brown from an order by the district court denying his motion to intervene. Warren Brown is the grandfather of Thomas and Me'chelle. On June 10, 1993, the Ninth District Court issued an Order of Preliminary Child Protection requiring the mother, Kathi Brown, to keep the children away from Warren Brown. Before the Department of Human Services (DHS) became involved, Warren had been involved with the family, helped with the care of the children by babysitting, had an ongoing relationship with the children and was sometimes referred to as a "surrogate father". In 1989, Thomas disclosed to his mother that Warren had sexually abused him but no action was taken at that time. On May 20, 1993, Warren took Me'chelle to his home instead of putting her on the bus to daycare. He then proceeded to get drunk and pass out. Kathi found Me'chelle at Warren's house and on May 25,1993 obtained a protection from abuse order against Warren. Meanwhile, on May 21, 1993, Thomas disclosed the 1989 sexual abuse incident to a DHS caseworker. DHS then obtained the June 10, 1993 order

prohibiting Warren from having any contact with either Thomas or Me'chelle. No criminal charges were ever brought against Warren in connection with the sexual abuse matter, apparently because of Thomas' age at the time of the incident and concerns about him testifying against his grandfather.

On July 14, 1993, Kathi was admitted in Jackson Brook Institute (JBI) as a result of her threats to commit suicide. While at JBI she made statements to her therapist about abusing her children and being a threat to them. DHS petitioned for temporary custody of Thomas and Me'chelle on the basis of the allegations of the 1989 sexual abuse as well as the May 20, 1989 incident, both involving Warren. DHS was granted temporary custody on July 15, 1993. A hearing was held in August, 1993 on DHS petition for a preliminary order granting it custody of the children. Jeffrey Brown, father of the children, was not present. Warren attempted to attend the hearing and present testimony but he was denied access. No further hearings on the substance of the Preliminary Order of Protection have since occurred.

In June, 1994, Warren sought intervener status under M.R.Civ.P. Rule 24, claiming he had an interest in the litigation, that he had lost his relationship with his grandchildren because of the allegations made against him and that he should be allowed to intervene as a party to re-establish visitation with his grandchildren. OHS objected to the motion and Warren was denied intervener status. While an appeal was pending, 22 M.R.S.A. § 4005-B was enacted. That appeal was dismissed and Warren petitioned for intervenor status under the new statute.

DHS proceeded before the District Court with a plan for re-unification of the children with the mother. Warren's petition to intervene was then considered by the court. DHS and

Guardian ad Litem of the children opposed the motion. The court noted that Warren's petition sought "to clear his name and, in doing so, to extinguish a significant portion of DHS's basis for a finding of jeopardy." The court found that "Allowing Warren Brown to utilize these proceedings to vindicate his name does not advance any recognized purpose under Section 4003, nor would such intervention be in the best interest of the children. As an intervenor, Mr. Brown would have access to all records concerning the children and their therapist or treatment providers; subject the children to being called as witnesses by him and confronting him in court, needlessly complicating and potentially prolonging the proceeding and interfere with possible reunification efforts. None of these consequences are in the best interest of the children. All other basis for intervention advanced by Warren L. Brown do not support a conclusion that intervention is in the best interest of the children."

22 M.R.S.A.§ 4005-B (2) provides: "A grandparent of a child may petition the court for standing and intervener status in any child protection proceeding under this chapter. The standing and intervenor status is limited to that proceeding unless otherwise ordered by the court." Section 4005-B(3) provides: "The court shall grant standing and intervenor status when the court finds that the grandparent has an existing relationship or has made sufficient effort to establish a relationship with the child, that that status would be in the best interests of the child and that that status would also be consistent with the purposes of this chapter as set forth in section 4003."

Warren contends that the District Court committed error of law in denying him intervenor status, that intervention is a matter of right when the statutory criteria are met and that those criteria have been met. DHS contends, and the court agrees, that the

standard of review for a conditional right to intervene, analogous to permissive intervention, is abuse of discretion. This court must therefore look to the decision of the District Court and determine whether there was an abuse of discretion. The District Court had before it the task of considering a plan for reunification or the children with their mother. It had the benefit of the reports of the therapists who had treated the children, the respective positions or the Guardian ad Litem and DHS and the reasons for there opposition to the intervention by Warren. It was clear to the court that the primary purpose of the petition for intervention was Warren's attempt to clear himself of the allegations of sex abuse and placing Me'chelle in jeopardy when he became intoxicated. The right to intervenor status by a grandparent is conditional. The primary concern of the court is always the best interests of the child. The court considered all the evidence before it which could bear upon the best interests of Thomas and Me'chelle. The problems of Kathi, the manner in which she had dealt with those problems and the plan for reunifying her with her children was the proper focus of the hearing. To give Warren intervenor status for the purpose of attempting to clear his name would have added burdens which the court properly concluded were definitely not in the best interests of the children. The court did not abuse its discretion. It committed no error of law.

For the foregoing reasons, the entry shall be

Appeal DENIED. Case remanded to District Court.

DATED: June 28, 1995

s/ Carl O. Bradford
Carl O. Bradord
Justice, Superior Court

APPENDIX E — ORDER OF THE DISTRICT COURT, STATE OF MAINE DATED OCTOBER 19, 1994

STATE OF MAINE
CUMBERLAND, SS

DISTRICT COURT
DISTRICT NINE
DIVISION OF SO. CUMBERLAND
CIVIL ACTION
DOCKET NO. POR-93-PC-045

DEPARTMENT OF HUMAN SERVICES

IN RE: THOMAS & ME'CHELLE BROWN

ORDER ON WARREN L. BROWN'S
SECOND MOTION TO INTERVENE

Before this Court is Warren L. Brown's second Motion to Intervene pursuant to 22 M.R.S.A. Section 4005-B, seeking to take advantage of the recent enactment of Section 4005-B, expanding persons eligible for intervenor status. For the reasons stated below, said Motion is denied.

Warren L. Brown is the paternal grandparent of the minor children and his alleged sexual abuse of one of the children formed a part of the basis for the pending petition. By intervening, Warren L. Brown seeks to clear his name and in doing so extinguish a significant portion of DHS's basis for a finding of jeopardy.

22 M.R.S.A Section 4005-B allows a Court to grant standing and intervenor status to a grandparent if " . . . that status would be in the best interest of the child and . . . consistent

with the purposes listed in Section 4003." Allowing Warren L. Brown to utilize these proceedings to vindicate his name does not advance any recognized purpose under Section 4003, nor would such intervention be in the best interest of the children. As an intervenor, Mr. Brown would have access to all records concerning the children and their therapist or treatment providers; subject the children to being called as witnesses by him and confronting him in Court, needlessly complicating and potentially prolonging the proceeding and interfere with possible reunification efforts. None of these consequences are in the best interest of the children. All other basis for intervention advanced by Warren L. Brown do not support a conclusion that intervention is in the best interest of the children. The Guardian ad Litem, as the representative of the children, opposes this Motion.

As a result of the foregoing, Warren L. Brown's Motion to Intervene is DENIED.

DATED: October 19, 1994

s/ Peter J. Goranites
Peter J. Goranites, Judge
Maine District Court

A TRUE ATTESTED COPY
s/ Debra E. Nowak
Clerk

APPENDIX F — RELEVANT STATUTE

22 M.R.S.A. § 4005-B

§ 4005-B. Grandparent's right to standing and intervenor status in child protection proceedings

1. Definition. For the purposes of this section, "grandparent" means the biological or adoptive parent of the child's biological or adoptive parent. "Grandparent" does not include the parent of a child's parent who consented to adoption or whose parental rights have been terminated.

2. Petition. A grandparent of a child may petition the court for standing and intervenor status in any child protection proceeding under this chapter. The standing and intervenor status is limited to that proceeding unless otherwise ordered by the court.

3. Criteria. The court shall grant standing and intervenor status when the court finds that the grandparent has an existing relationship or has made sufficient effort to establish a relationship with the child, that that status would be in the best interests of the child and that that status would also be consistent with the purposes of this chapter as set forth in section 4003.

4. Request for placement. In any proceeding when standing and intervenor status have been granted, the grandparent may request the court to order that the child be placed with the grandparent. In making a decision on the request, the court shall give the grandparents priority for consideration for

placement if that placement is in the best interests of the child and consistent with the purposes listed in section 4003.

5. Procedure if child in jeopardy. Nothing in this section limits the department from removing the child from the grandparent's home if the child is in jeopardy.

1993, c. 697 § 1.

APPENDIX G — VERIFIED COMPLAINT AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL DATED NOVEMBER 3, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DOCKET NO.
95-353-PH

WARREN L. BROWN, an individual residing in Portland, County of Cumberland, State of Maine,

Plaintiff

v.

MAINE DEPARTMENT OF HUMAN SERVICES, an agency of the State of Maine,

ROLAND IVES, JANE SHEEHAN AND KEVIN CONCANNON, individually and in their official capacities, or former capacities, as Commissioner(s) of the MAINE DEPARTMENT OF HUMAN SERVICES;

DONNA NIEMI, individually and in her official capacity as an employee of the MAINE DEPARTMENT OF HUMAN SERVICES;

DEBRA SCHAEDLER, individually and in her official capacity as an employee of the MAINE DEPARTMENT OF HUMAN SERVICES;

FRANCES KEATING, individually and in her official capacity

as an employee of the MAINE DEPARTMENT OF HUMAN SERVICES;

KEVIN DAGNEY, individually and in his official capacity as an employee of the MAINE DEPARTMENT OF HUMAN SERVICES,

ELLEN POTTER, individually and in her official capacity as an employee of the MAINE DEPARTMENT OF HUMAN SERVICES,

Defendants

VERIFIED COMPLAINT AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

Plaintiff, WARREN L. BROWN, by his counsel hereby complains of Defendants as follows:

PARTIES

1) Warren L. Brown is an individual residing in Portland, County of Cumberland, State of Maine, and is the grandfather of two minor children, Thomas Brown and Me'chelle Brown.

2) The Maine Department of Human Services is an agency of the State of Maine created pursuant to 22 M.R.S.A. Section 1, *et seq.* ("DHS"). DHS is responsible for the general supervision of the interests of health and life of the citizens of Maine, including responsibility for insuring proper care of minors.

3) Roland Ives and Jane Sheehan are individuals who are former Commissioners of DHS. Kevin Concannon is an individual who is the current Commissioner of DHS. The Commissioner is responsible for the control and supervision of the personnel and activities of DHS.

4) Donna Niemi is an individual employed or formerly employed as a child protective worker with DHS, Child Protective Division.

5) Debra Schaedler is an individual employed as a child protective worker with DHS, Child Protective Division.

6) Kevin Dagney is an individual employed or formerly employed as a child protective worker with DHS, Child Protective Division.

7) Ellen Potter is an individual employed or formerly employed as a child protective worker with DHS, Child Protective Division.

8) Frances Keating is an individual employed as a child protective worker and/or supervisor with the DHS, Child Protective Division and is or was the supervisor of Donna Niemi, Kevin Dagney, Ellen Potter and Debra Schaedler.

JURISDICTION

9) Jurisdiction in this court is based on federal questions related to enforcement of rights secured by individuals under the First and Fourteenth Amendments to the United States Constitution and laws of the United States of America, including specifically 42 U.S.C.A. Sections 1983 and 1988.

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10) The Court may grant equitable relief in the form of declaratory and injunctive relief pursuant to 42 U.S.C. Section 1983.

ALLEGATIONS

11) Plaintiff Warren L. Brown is the paternal grandparent of the minor children Thomas Brown and Me'Chell Brown. These children are currently in the custody of DHS.

12) On or about June 10, 1993, Donna Niemi made an affidavit ("Niemi Affidavit") wherein she alleged that Warren Brown was an untreated sexual offender and, on that basis and perhaps others, DHS obtained a preliminary child protection order from the Court, dated June 10, 1993 (the "Order").

13) The Order did at least the following:

a. Prohibited the mother, Kathi Duncan, from allowing the children contact with Warren Brown;

b. Required the mother to allow DHS access to the children so that the Order could be monitored.

14) The allegation that Warren Brown was an "untreated sexual offender" was based on an allegation of sexual abuse made by the mother on or about November 3, 1989 — over three years prior. The allegation had been investigated by DHS and/or the DHS investigation had been dropped and any investigation by the police department found no evidence on which to base any charge of sexual abuse against Warren Brown.

15) During the time between the allegation of sexual abuse

against Warren Brown in November, 1989, and the Order dated June 10, 1993, Warren Brown had seen his grandchildren regularly, frequently babysitting for the mother including babysitting over night. The contact between Warren Brown and his grandchildren was always at the request of the mother.

16) DHS was aware that Warren Brown was in steady contact with the grandchildren. In fact, Warren Brown was the acting "safety net" for the children in that numerous complaints of child abuse had been made against the mother regarding Thomas and Me'chell. Plaintiff cared for the children because he believed them to be in danger from the mother, who had already once had her rights to parent children other than Me'Chell and Thomas terminated as a result of her child abuse and/or neglect.

17) The mother made the allegations against Warren Brown as a result of her own fear of being targeted and investigated by DHS for child abuse.

18) After the Order issued on June 10, 1993, DHS or its agents gave Warren Brown, his attorney and others, copies of the Niemi Affidavit and Order.

19) The allegations against Warren Brown became known by others and the circumstances of his inability to have further contact with his grandchildren became known by others as a result of the things done to him by DHS.

20) In August, 1993, DHS removed the children from the home of the mother for reasons independent from the allegations made by DHS and Donna Niemi against Warren Brown, and placed the children in foster care.

Appendix G

21) Warren Brown sought to be heard regarding the allegations made against him by appearing pro se at subsequent child protective court proceedings, but was denied entrance to the court room by use of physical force or threat of physical force and verbal commands by DHS agents, attorneys and/or personnel and the court bailiff and/or other court personnel.

22) Since the issuance of the Order over two years ago and the exclusion of Warren Brown from any court proceeding or hearing related to the Order:

a. Warren Brown has been deprived of all contact with his grandchildren;

b. Warren Brown has been deprived of his reputation, his dignity and his legal right to associate with his family, including his own son, the father of Thomas and Me'Chell, and has suffered physically, psychologically and emotionally as a result of the outrageous conduct of DHS;

c. Warren Brown has been deprived of all rights or forums which might provide him the opportunity to regain his relationship to his grandchildren;

d. Warren Brown has been deprived of all rights or forums which might provide him the opportunity to clear his reputation and rebut the allegation by DHS that Warren Brown is an untreated sex offender and/or should not be allowed contact with his grandchildren.

24) The allegations made by DHS against Warren Brown were unnecessary to obtain protection of the minor children, were made in bad faith and as a pretext for obtaining greater surveillance of the mother for suspected child abuse.

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25) If the allegations made by DHS against Warren Brown were necessary to obtain protection of the minor children, then any state statute disallowing Warren Brown's participation in any subsequent court procedure to answer the charges has denied Warren Brown due process protection guaranteed under the United States Constitution.

26) The practice of obtaining greater surveillance of a person suspected of child abuse by pretext or other improper method is well known and endorsed by personnel, including Francis Keating and Kevin Concannon. DHS is, in fact, the moving force behind such a practice.

27) Defendants Debra Schaedler, Kevin Dagney and Ellen Potter have implemented the Order on behalf of DHS.

28) Defendants Francis Keating and Kevin Concannon failed to supervise, train and control the actions of their subordinates and have constructive knowledge of the practices and procedures which deprived Plaintiff of his Constitutional rights.

29) To address the wrongs done to him, Plaintiff brought in the Maine District Court, District Nine, a Motion to Intervene in the child protective proceedings. Said motion was denied.

30) Plaintiff appealed the denial of his Motion to Intervene to the Maine Superior Court, where the denial of his motion was upheld.

31) Plaintiff has pending an appeal to the Maine Supreme Judicial Court of the denial of his Motion to Intervene.

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32) On or about September 13, 1995, DHS petitioned to the Ninth District Court, Division of Southern Cumberland, for termination of the parental rights of the parents of Thomas and Me'Chell Brown. A hearing on the petition against the father, Jeffrey Brown, is scheduled for November 7, 1995 at 1:00 p.m.

33) Plaintiff, by motion to the Maine Supreme Judicial Court, sought an order to stay the termination proceedings until a decision on his appeal of the Motion to Intervene was decided. The Motion to Stay the termination proceedings was denied by Order dated November 1, 1995.

34) If the hearing on the termination petition takes place, Plaintiff will lose his forum to dispute the charge by DHS that he has sexually abused his grandchildren.

COUNT I

35) Plaintiff has been deprived of his rights encompassed by the First and Fourteenth Amendments to the United States Constitution in the following ways:

a) Plantiff has been denied freedom of personal choice in matters of family life and personal associations with no due process;

b) Plaintiff has been deprived of his reputation, his ability to engage in the everyday activities of his life and other liberties by the statements made, the allegations brought forth, and the process which has denied him any opportunity for redress, rebuttal or denial;

c) These losses have occurred because of what DHS and the government are doing to him.

COUNT II

36) Defendants' conduct violates 42 U.S.C.A. Section 1983 in that Defendants were acting under color of state law and their conduct deprived Plaintiff of rights, privileges and immunities secured by the Constitution or laws of the United States.

37) Defendants' conduct was in disregard of well settled principles of law.

38) Defendants did not have a good faith belief that their actions were within the law.

39) Defendants breached their duty with regard to the supervision of the conduct of DHS personnel in that supervisors failed to train, supervise and/or control the actions of their subordinates and are therefore liable.

40) Defendants had actual or constructive knowledge of the practices and procedures which deprived Plaintiff of his Constitutional rights.

41) Defendants, upon learning of the wrong, failed to remedy the wrong.

COUNT III

42) Plaintiff seeks declaratory and injunctive relief because there is no remedy at law to adequately address the immediate

and irreparable harm which will occur if Plaintiff is excluded from participating in a meaningful way from certain child protective proceedings.

43) Defendants should be enjoined from bringing proceedings wherein Plaintiff's rights to association with his grandchildren are adjudicated without allowing his full and meaningful participation.

44) Defendants should be enjoined from bringing proceedings wherein Plaintiff's reputation and/or conduct are put into dispute without the opportunity for Plaintiff to fully and meaningfully respond.

COUNT IV

45) Plaintiff is entitled to attorney's fees and costs upon prevailing on any aspect of this suit pursuant to 42 U.S.C.A. Section 1988.

PRAYER

WHEREFORE, Plaintiff prays:

For judgment against Defendants on Counts I, II, and IV and for monetary damages in the amount of at least $1.2 million plus attorney's fees and costs.

For judgment against Defendants on Counts III, for an injunction prohibiting Defendants from bringing any proceeding involving the matters complained of herein without Plaintiff's presence and for attorneys fees and costs.

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For such other and further relief as this court deems just and proper.

Dated at Portland, Maine this 3 day of November, 1995.

s/ Warren L. Brown
Warren L. Brown
Plaintiff

s/ Paula House McFaul
Bar Roll Number 1133
Attorney for Plaintiff

STATE OF MAINE
CUMBERLAND, SS. DATE:

Personally appeared the above-named Warren L. Brown and made oath that the foregoing statements are true and based on his own personal knowledge, except any statements made upon information and believe, which such statements Warren L. Brown believes to be true.

s/ John Eisenhart
John Eisenhart
Attorney-at-Law

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